U.S. Department of Labor

Office of Administrative Law Judges
St. Tammany Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (FAX)

Issue Date: 03 April 2007

CASE NO.: 2005-LHC-2148

OWCP NO.: 07-173774

IN THE MATTER OF:

W. F.[1]

Claimant

v.

BOLLINGER SHIPYARD, INC.

Employer

and

AMERICAN LONGSHORE MUTUAL ASSN., LTD.

Carrier

APPEARANCES:

GINO J. RENDEIRO, ESQ.
For The Claimant

KEVIN A. MARKS, ESQ.
RANDY HOTH, ESQ.
For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

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[1] Pursuant to a policy decision of the U.S. Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Claimant against Bollinger Shipyard, Inc. (Employer) and American Longshore Mutual Assn., LTD. (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on May 16, 2006, in Covington, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 47 exhibits, Employer/Carrier proffered 34 exhibits which were admitted into evidence. This decision is based upon a full consideration of the entire record.[2]

Post-hearing and supplemental briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated and I find:

1. That if Claimant was injured, as alleged on March 3, 2005, his injury occurred during the course and scope of his employment with Employer. (Tr. 10).

2. That Employer/Carrier filed a Notice of Controversion on April 4, 2005. (Tr. 11).

3. That an informal conference before the District Director was held on June 14, 2005. (Tr. 12).

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[2] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer/Carrier's Exhibits: EX-___; and Joint Exhibit: JX-___.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; fact of accident/injury.

2. The nature and extent of Claimant's disability.

3. Claimant's average weekly wage.

4. Entitlement to and authorization for medical care and services.

5. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant provided a recorded statement on March 17, 2005, which was transcribed, and was deposed by the parties on January 4, 2006. (CX-23 and EX-9; CX-24 and EX-10). He was also deposed in an unrelated civil matter on November 10, 2006. (EX-34). Claimant testified at formal hearing that he has a tenth grade educational level. In his statement and deposition, he affirmed he graduated from high school (CX-23, p. 2; CX-24, p. 27), and did not receive a high school diploma, but rather an equivalency certificate. (Tr. 20-21). He attended vocational school for shipfitting and welding. (Tr. 21). He also attended a PEC (Petroleum Education Council) training class for safety and chemical spills. (Tr. 22).

He testified that after Employer he worked four days for East Baton Rouge Housing Authority. He stopped working because of back pain. (Tr. 23). Before working for Employer, he drove a tow truck on a commission basis. (Tr. 24). His most recent period of employment with Employer began in January 2005 in the shipfitting department as a blaster/painter at $11.00 an hour. (Tr. 25).

Claimant testified that on March 3, 2005, at about 11:45 p.m., he and co-worker Olivia Landry were shoveling sand out of a barge in preparation for blasting. Ms. Landry was inside a barge compartment and could not have seen his accident. He

stated "Clifton and Eddie was (sic) painting right next door . . . some type of boat or something." (Tr. 27, 40, 41). It was customary for Clifton Hawkins to turn off their blasting machines to signal the end of a shift. Claimant testified that, as he grabbed the ladder, the barge "slammed against the land," and he "flipped over and landed on his back," falling from the top of the ladder about five or six feet.[3] (Tr. 28, 35). He stated Clifton Hawkins was an eye witness to the accident.[4] Claimant rides to and from work with Hawkins who lives with his wife's sister. (Tr. 29). He soaked in hot water upon arriving home. (Tr. 42).

Claimant added that the barge "really rocks" and "we had just finished (painting) some type of cruise ship with a big old red propeller . . . and they tied that on to . . . the outside of the barge . . . it (was) really making that barge rock because it's a big cruise ship and all the drydock was full and they didn't really have nowhere to park it . . . when it rocks, it was slamming up against the deck like that . . . if a boat or something pass . . . you could barely stand up in it."[5] (Tr. 30). Claimant believed that a wave from a passing boat or a barge hit the cruise boat . . . which made the barge move up and down and hit the bank." (Tr. 30-31). He did not see any boat or barge that made a wave, but "just felt it."[6] (Tr. 32).

Claimant testified that Clifton Hawkins could not have seen him fall, but asked if he was "all right," "I heard your helmet (blasting hood) hit the ground." (Tr. 33). Claimant responded he was "all right," and "hurried up and got up" . . . "because I'm not going to show it. I was really hurt." Clifton told him "you better go let Reco know that you fell." Claimant stated he "went up and I told Reco that I fell, and he told me to go let

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[3] Claimant testified that he fell to the exterior of the wall and did not fall inside the barge. (Tr. 114). In his statement, he stated he fell "out on the ground." (CX-23, p. 10).

[4] In response to Interrogatory No. 4 in January 2006, Claimant represented that he could not recall any eye witnesses to his accident. (CX-47).

[5] Claimant stated the barge had drifted away from the landing and there had never been that much weight (the cruise ship) hooked to the outside of a barge. (Tr. 126-127).

[6] In his statement to Mr. Palmintier, he indicated a tugboat or towboat pushing four tows caused the wake. (Tr. 116; EX-9, p. 9). Clifton Hawkins had informed him of the tugboat passing through the Harvey Canal. (Tr. 117).

Sugarfoot know."[7] Sugarfoot or Lester Stann is the electrician/safety man at night who fills out the papers and to whom employees report accidents or injuries. "Sugarfoot" walked him across the street to Hank Santos's office to complete a safety sheet or accident report. Sugarfoot stated he did not "know how to fill" the sheet out and asked Claimant to sign his name and he would take care of everything. (Tr. 34, 37, 40). Sugarfoot told him that whatever had to be done, "they're going to do tomorrow." Claimant understood that Hank Santos, the safety man, would fill out the accident report. (Tr. 41).

Claimant informed Sugarfoot that "everything feels numb, it feels kind of funny," and declined an ambulance, but reported "my back is hurting." (Tr. 36). He told Sugarfoot that Clifton Hawkins had witnessed the accident and that Olivia was also on the barge but had not witnessed the accident. (Tr. 37). Claimant told Olivia that he had fallen. (Tr. 39).

Mr. Hawkins and Claimant do not talk to each other anymore because of "a lot of women problems." Mr. Hawkins thought Claimant was informing his girl friend that he was cheating on her. (Tr. 38).

Claimant testified he has had no prior back injuries while working on the job or off the job or any recommendations for surgery or any type of treatment for a low back injury. (Tr. 42).

On March 4, 2005, Claimant returned to work and talked to Eddie Barnes, the yard superintendent, reporting what had happened since Sugarfoot had not prepared a report. Barnes told Claimant "they was going to send me to a doctor, but just try to toughen it out . . . I don't need no loss time accident right now." (Tr. 43). Barnes stated "they'd make it light on me, put me on light duty. If I try to toughen it out at work, that everything would be all right . . . he say because he had a back injury before and it was just a bruise." Claimant testified he was sitting down at work a lot, doing light duty stuff. (Tr. 44).

The weekend following his accident, Claimant testified his back felt tight, was pounding, like somebody pushing on it, and was just unexplainable pain. (Tr. 44-45). On March 7, 2005, a

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[7] Claimant later testified Reco had left early that night and he did not speak to Reco. (Tr. 35, 136; CX-23, p. 10).

Monday, Claimant returned to light duty work. He stated Barnes, Allen Stein and "Don" wanted to talk to him. Don recorded his statement and stated they were "going to try to get [his] workman's comp started." (Tr. 45). Claimant worked the whole week on light duty.[8] On March 12, 2005, his birthday, he awoke and "couldn't move. It felt like I was paralyzed," his back had locked up on him. (Tr. 46). His wife brought him to the West Jefferson Hospital emergency room where x-rays were taken, a bruise was diagnosed and pain medications provided. (Tr. 47).

On March 14, 2005, Claimant returned to Employer and spoke to Eddie Barnes and Hank Santos about his back injury. Santos drove him to the company doctor, Dr. Howard Nelson. Claimant reiterated that Santos informed him he was "going to mess up their safety bonus for no loss time accidents," and wanted him to come back to work and continue sitting in the tool room. Claimant stated Dr. Nelson informed Santos that he was not releasing Claimant back to light duty. (Tr. 51). However, Dr. Nelson completed a "Work Status Report" on March 14, 2005, which released Claimant to modified duty with no lifting more than five to ten pounds and no repetitive bending, stooping, squatting, pushing, jerking, twisting and bouncing. (Tr. 52; CX-35, p. 3). On March 16, 2005, Dr. Nelson took Claimant off work indefinitely. (Tr. 53; CX-35, p. 4).

Claimant underwent an MRI ordered by Dr. Nelson who diagnosed a herniated disc at L5-S1 with right nerve root impingement. (Tr. 55; CX-35, p. 7). Dr. Nelson recommended that Claimant seek treatment with a neurosurgeon, Dr. Vogel. (Tr. 56-57). Dr. Vogel informed Claimant that a steroid injection should be tried and if unsuccessful, he would have to have surgery. (Tr. 57). The steroid injections and surgery were never performed. (Tr. 58). Claimant was also examined by Dr. Steck, a neurosurgeon, at the request of Employer/Carrier and Dr. Chambers, a pain doctor. (Tr. 58-59).

Claimant testified that he has constant lower back pain that radiates to the "right side of [his] leg." He takes Vicodin medication for pain. He acknowledged that he can carry his small child, but it hurts to do so. (Tr. 61). He stated he can also carry a small dog as shown on the surveillance video.

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[8] In his statement Claimant stated that on March 10 and 11, 2005, he was "removing these boards" from underneath a boat, pulling the boards, on his knees and crawling. This activity caused his back to worsen. (CX-23, p. 16).

(Tr. 62). He affirmed that on May 21, 2005, he was filmed helping move a TV set with assistance from Mr. Hawkins.[9] (Tr. 63).

Claimant testified that Employer's time sheets which show him, Mr. Hawkins and Ms. Landry working only 2.5 hours on the night of March 3, 2005, were incorrect. (Tr. 66-67). Claimant stated Employer's time sheets are messed up "all the time at their yard." (Tr. 68). Time sheets are maintained exclusively by Employer's supervisors. (Tr. 69).

Claimant testified he was working light duty when Ms. Landry sustained a work accident. He was performing watch duty when she stepped onto a hole cut-out and fell through. (Tr. 70). Claimant was unable to help her out because of his back injury. He stated he did not hurt his back helping her out of the hold and never told anyone at Employer that he did. (Tr. 71).

Claimant reviewed Employer's "Loss Causation Clues for Error Chain Analysis" document for accuracy. (Tr. 71-74). He denied that his accident occurred on February 22, 2005, or that he worked all week after his accident since he was sitting around on light duty. (Tr. 74-75).

On cross-examination, he acknowledged that he represented on his employment application that he completed the twelfth grade, not the tenth, and had received a high school diploma. (Tr. 82-83; EX-17, p. 17). He confirmed that he also represented in his statement to Mr. Palmintier and in deposition that he graduated from high school. (Tr. 84-85). He testified that he understands basic math skills and can add, subtract, multiply, divide, make change and operate a bank account. (Tr. 88). He can read and write. (Tr. 89).

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[9] In deposition, Claimant testified that during the first 90 days after his injury he followed his doctor's five-pound lifting restrictions because he couldn't move too much and it hurt to get out of bed. (CX-24, p. 149). He further stated it was like he was paralyzed, he couldn't bend down to tie his shoe and all he could do was lie down on a couch because it hurt to walk. (CX-24, pp. 152, 154). He stated "I can't do anything." (CX-24, p. 155). If he did pick up anything weighing over five pounds, "it would hurt." (CX-24, p. 167). The surveillance video, taken within the first 90 days after his injury, contradicts his purported inactivity.

Claimant affirmed that he had never hurt his back before the instant work accident. (Tr. 90, 92). He acknowledged that he had motor vehicle accidents in 1999 and 2005 injuring his neck and head.[10] (Tr. 90-91). In deposition, he failed to mention a motor vehicle accident in 2000 in which he injured his back and right arm which is recorded in a history provided to Dr. Barry Bordonaro. (Tr. 93; EX-3, p. 2). He stated he sought therapy for his back problems and had recovered. (Tr. 94). He also confirmed that Dr. Bordonaro diagnosed him with a lumbar spine sprain as a result of a motor vehicle accident on June 18, 2003. (Tr. 94-95). He received five treatments for his back pain with a TENS unit. (Tr. 99). He testified that he had never sustained an injury like his job injury and had never been through this type of pain. (Tr. 96).

Claimant further acknowledged that he reported to Mr. Palmintier that he had never hurt his back on or off the job before the instant work accident. (Tr. 100-101; CX-23, p. 20). In deposition, he affirmed that he had never injured his back on any job before the instant accident. (Tr. 102; CX-24, p. 55). He also deposed that he had never injured his back off the job before March 3, 2005, and had never sought treatment for a back injury. (Tr. 103-104; CX-24, pp. 51, 56). He further deposed that he had never complained of back pain to any health care provider and had never experienced back pain before March 3, 2005. (Tr. 104-105; CX-24, p. 56). He testified that he told his treating and consultative physicians about his prior car accidents. (Tr. 106). He also testified at hearing that the physicians did not ask about any prior back injuries and he did not have any prior back injuries which required him to go to the doctor. (Tr. 109).

Claimant testified that after he reported his accident he went home with Mr. Hawkins. He did not go to the emergency room or to a doctor. (Tr. 138). When he returned to work the next day, he met with Eddie Barnes and provided details of his accident for an accident report. He stated Allen Stein entered Barnes's office and talked to him about toughening it out. (Tr. 140). They told Claimant that a loss time accident would "mess up their safety bonus." (Tr. 141). During the following week,

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[10] He denied injuring his back in the 2005 motor vehicle accident. (CX-24, p. 70).

Claimant worked light duty, sitting down performing fire watch duty. (Tr. 142). He affirmed he did not attempt to help Ms. Landry after her accident and did not tell anyone with Employer that he hurt his back doing so. (Tr. 143).

In deposition, Claimant testified that he could not or would not carry anything that weighed more than five to ten pounds. He acknowledged he can carry his child, a dog and helped move a large TV. (Tr. 148). He denied stating in deposition that after the first 90 days "things had gotten better" and he was "able to walk and even jog."[11] (Tr. 147, 149). He confirmed he stopped working for the Housing Authority because his back was hurting, but did not seek medical care or treatment. (Tr. 151).

Claimant stated he disagreed with the Employer's time records which show that he, Ms. Landry and Mr. Hawkins only worked 2.5 hours on March 3, 2005. He did not know what he received in pay for the day and did not complain about being shorted for time worked on March 3, 2005. (Tr. 154).

Claimant confirmed that he had no back problems affecting his work before his work accident on March 3, 2005. (Tr. 157).

Claimant's wife corroborated his testimony. She stated he informed her that he had fallen at work at the end of the shift and couldn't walk upon returning home. She helped him to the bathroom to take a shower. (Tr. 160). He was hurt on Thursday, a payday. He was in pain the following day and could not get out of bed the following weekend. She helped him go to the emergency room on March 12, 2005. (Tr. 161). Claimant has improved and can "do little stuff," picking up the kids and doing things around the house. (Tr. 162).

On November 10, 2006, Claimant was deposed by parties in an unrelated litigation involving his 2005 motor vehicle accident. Employer/Carrier moved to reopen the record to offer the deposition which they contend is in "direct conflict with [Claimant's] trial testimony on the issue of medical causation as it pertains to his job injuries." They correctly argue that, although Claimant acknowledged his 2005 motor vehicle accident at hearing, he "was adamant he did not injure or aggravate his

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[11] However, he testified that he had "gotten a little better" after the first 90 days, the pain was not as harsh and could now "jog a little bit." (CX-24, pp. 148, 155).

lower back condition" in the accident. It is further argued that Claimant testified at hearing "his condition never improved following his alleged job accident," contrary to his November 2006 deposition testimony. The deposition was received as EX-35[12] and supplemental briefs were allowed to treat the significance, if any, of the new evidence.

At hearing, contrary to Employer/Carrier's argument, Claimant testified that his back condition had improved after the first 90 days. He was able to "jog a little bit," and the pain was not as harsh.

In his November 2006 deposition, Claimant again consistently described his work accident (EX-34, p. 10), and prior auto accidents and the Travel Lodge incident. He deposed that after his motor vehicle accident, he went to the hospital in Baton Rouge, but could not be seen because it was overcrowded. (EX-35, p. 43). He contacted Dr. Vogel to report his auto accident and was told to continue taking his medications because his back was "going to be a little tight." (EX-35, p. 48). He stated after the auto accident, his back was tight and he was set back. (EX-35, p. 45). His back pain was feeling like a five on a scale of ten before the auto accident, because he was taking medications, going to therapy and stretching. (EX-35, pp. 51-52, 76). After the auto accident, "it just started everything like I got hurt back the first time," which he rated as a ten on a scale of ten. (EX-35, pp. 52-53, 76).

He affirmed in deposition that Dr. Vogel had recommended back surgery before his auto accident. (EX-35, p. 60). He again noted that he was moving around a little better before the auto accident, which set him back. (EX-35, p. 68). He confirmed that his back condition has gotten better since the auto accident. (EX-35, p. 77).

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[12] In the Order Reopening Record, the deposition was erroneously received as EX-34, but should have been marked as EX-35 since Employer/Carrier's surveillance video was received as EX-34. The deposition is referenced in this Decision and Order as EX-35.

Clifton Hawkins

Mr. Hawkins provided a recorded statement on April 26, 2005, which was transcribed, and was deposed by the parties on January 6, 2006. (CX-17; CX-18). Mr. Hawkins testified at hearing that he has worked for Employer for four years and continues to be so employed. His girlfriend is the sister of Claimant's wife and he and Claimant refer to each other as "brother-in-law." (Tr. 165). He and Claimant had some "family problems" at the time of his pre-hearing deposition because he thought Claimant was "lying on him" about a particular woman. (Tr. 166).

He affirmed that he witnessed Claimant "fall from a barge."[13] He had cut off the sandblasting pot and was walking to the deck when he saw Claimant climbing out of the tank, the barge shifted and Claimant fell.[14] He "guessed" the water was rough and windy and "they had boats coming through the locks." (Tr. 166; CX-17, p. 5). He recalled seeing a Jefferson Marine boat coming through the locks. (Tr. 167). He stated the barge had drifted out three feet or four feet from land. (Tr. 168). He confirmed it was dark when the accident occurred, "right before we knocked off . . . about 12:00, 12:10 [a.m.]."[15] (Tr. 169). He stated the barge was moving all night with a cruise boat tied next to the barge. (Tr. 170).

After Claimant fell, Mr. Hawkins asked if he was all right to which Claimant replied "yeah." When Claimant was getting into the truck to go home, he stated his back hurt. (Tr. 170). He told Claimant to report his accident to Sugarfoot. He placed the accident "about a year ago." (Tr. 171). He recalled that Ms. Landry's accident occurred three or four days after

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[13] In his statement, he admitted that he could not see Claimant when he fell because Claimant was inside the barge. (CX-17, p. 8). He also stated he saw Claimant fall off the tank when he was getting out of the barge. (CX-17, p. 9). He could not see where Claimant "ended up" inside the barge. (CX-18, p. 13).

[14] He estimated his location to be 40 feet from Claimant when he fell. (Tr. 180).

[15] In his statement, he estimated the time of occurrence to be "right before lunch," about 8:30 p.m. (CX-17, p. 11). In deposition, he stated the accident occurred about 11:45 p.m. (CX-18, p. 11).

Claimant's fall on the barge. (Tr. 172). He could not recall if he worked a full day on March 3, 2005, but has had problems with his pay check being short because the time sheets are wrong. (Tr. 173).

Mr. Hawkins testified that Claimant had no problems performing his work for Employer before his back injury. (Tr. 173). He drove Claimant to work after his injury and observed that he "looked like he was a little stiff because he couldn't really do the things he was doing." He disputed Employer's claim that Claimant's fall from the barge was fraudulent and that his testimony was untrue. (Tr. 174). He testified that he saw Claimant fall and had no reason to lie for Claimant. (Tr. 175).

On cross-examination, Mr. Hawkins confirmed that if he was shorted on his pay he would complain about it, but could not remember if he was shorted on March 3, 2005. (Tr. 177-178). If his check was short, Employer would look into the days and time he worked on the spreadsheets. (Tr. 178).

He affirmed that Claimant was climbing out of the barge when he "slipped to the side and he fell," back inside the wall of the barge. He recanted stating that he thinks Claimant fell on the outside of the barge wall. (Tr. 181). In deposition, he testified that Claimant fell backwards into the barge. (Tr. 182; CX-18, p. 48). He stated the barge was moving "probably" because of a passing tug, and was not sure if a sudden event made Claimant fall. (Tr. 183-184). He stated he walked over to the barge, but did not get on the barge. (Tr. 185-187). He acknowledged that in his April 2005 statement he indicated the accident occurred about 8:30 at night. At hearing, he stated he thinks he "cut the power off so we can go home." (Tr. 187). He affirmed his memory of the events in April 2005 would have been better. (Tr. 188). He could not affirm that Claimant's accident occurred on March 3, 2005, but he witnessed the fall and it was nighttime. (Tr. 199-200).

Mr. Hawkins stated he saw a red tugboat, like the Jefferson Marine boats, pushing up water to create a wave coming from the direction of the Harvey Lock the night of Claimant's accident.[16]

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[16] In deposition, he recalled seeing "a couple of boats," one of them was a white tug boat. (CX-18, pp. 13-14). He recalled seeing three boats come through "one behind the other" which created a lot of waves. (CX-18, pp. 57-58).

He stated he cuts the power off for lunch at about 8:30 p.m. and when they knock off around 12:00 a.m., and thought Claimant's accident occurred when they were knocking off at around 12:00 a.m. (Tr. 188-190). He also acknowledged that the mooring lines to the barge were loosened which probably caused the barge to bounce up and down. He and Claimant were in the drydock crew responsible to tie down the mooring lines. (Tr. 193). The barge was "a foot or two" from the bank. (CX-18, 17). He took no action to tie down the mooring lines. (Tr. 194). He did not pull on the lines to help bring the barge closer to land for Claimant to get off. (Tr. 196).

Mr. Hawkins stated he witnessed Claimant reporting his accident to Reco Sims on the night of the accident. Claimant informed Reco Sims that he had hurt his back. Sims told Claimant to talk to Sugarfoot. He would disagree with Claimant's testimony that Sims had already left for the evening and he did not have an opportunity to report his accident to Sims. (Tr. 197; CX-18, pp. 34-35). Contrary to his deposition testimony that Claimant reported his accident to Sugarfoot the next day, he testified Claimant informed Sugarfoot of his accident the night it occurred. (Tr. 197-198; CX-18, pp. 53, 55). In deposition, he stated he was present when Eddie Barnes asked Claimant to try to tough it out, but did not hear Barnes tell Claimant not to report the accident because it would affect the safety bonuses. (CX-18, pp. 31, 64-65).

Olivia M. Landry

Ms. Landry provided a recorded statement to Employer on March 18, 2005, and was deposed telephonically by the parties on February 1, 2006. (CX-25 and EX-15; CX-26 and EX-16).

In her statement she confirmed that she was injured on March 8, 2005, and that Claimant was injured on March 3, 2005. (CX-25, p. 2). She recalled the date of her injury because it was her girlfriend's birthday. (CX-26, p. 63). She stated that Claimant was "down in the tank" when he lost control of his sandblasting hose/whip and was knocked down when a wave passed through. Claimant complained of his elbow, brush burns on his arms and his back being uncomfortable. (CX-25, p. 5). She also affirmed that Claimant attempted to assist her when she fell in a hole by lifting her up, but "hollered" that his back was hurting. (CX-25, p. 6).

In deposition, she stated Claimant was injured at 6:30 p.m. or 7:00 p.m., before lunch which is usually taken between 8:00 p.m. and 8:30 p.m. (CX-26, p. 26). She again confirmed that Claimant lost control of his hose and slipped. (CX-26, p. 29). Claimant complained of his back and elbow hurting. (CX-26, p. 32). She recalled several co-workers helping Claimant out of the compartment, including Mr. Hawkins and Mr. Perry. (CX-26, p. 35). Claimant was assisted to the office, but Sugarfoot was not present on March 3, 2005. (CX-26, p. 38). She denied that another vessel, including a paddle-wheeler or the Cotton Blossom, was tied to the barge on which she and Claimant were working on March 3, 2005. (CX-26, pp. 39-40). She again confirmed that Claimant attempted to help her when she fell into a hole by, among other things, squatting down and allowing her to wrap her arms around his shoulders in an effort to pull her up from the hole. (CX-26, pp. 43-44). No one else assisted her after her accident. (CX-26, p. 45).

On cross-examination, she could not recall if Claimant fell off a ladder when the barge shifted because of a wake created by a passing tug. She stated it would not be unusual to fall from a ladder because of a wave or wake. (CX-26, p. 56). She could not confirm or deny whether Claimant was injured by falling from a ladder. (CX-26, p. 57). She was aware of Claimant falling because of a wake rocking the barge, but did not know the date of the fall or what injury, if any, he sustained. (CX-26, pp. 60-61). Claimant did not tell her he injured his back from a fall from a ladder. (CX-26, p. 62). She observed Claimant "wrestling" with the sandblasting hose and guessed "he pulled a disk trying to hold onto" it. (CX-26, p. 65). She observed Claimant fall during the hose incident. (CX-26, p. 76). She assumed the barge incident took place between 6:30 p.m. and 7:00 p.m., but confirmed she knew nothing about the incident. (CX-26, pp. 72, 78).

Despite the foregoing, she also testified she observed Claimant fall from a ladder on one occasion because of a wake while he was blasting, but could not recall when the fall occurred. (CX-26, pp. 86-87). Claimant did not complain about his back hurting after the fall. (CX-26, p. 88).

Lester Stann

Mr. Stann provided a recorded statement on March 22, 2005, which was transcribed, and was deposed by the parties on April 25, 2006. (CX-19 and EX-13; CX-20). At the formal hearing, Mr. Stann, also known as Sugarfoot, stated he has been employed by

Employer for 11 years in electrical maintenance. He is the night shift First-Aid person to whom employees would report if injured. (Tr. 203, 223). He is responsible to take an accident report or information from the injured employee and to bring the employee to First-Aid and log the injury into the medical log book. (Tr. 204; CX-16).

He recalled Ms. Landry reporting a fall in a hole and scraping her thighs and back. He recorded her injury in the medical log book on the day she reported the accident. He stated that when Ms. Landry reported her injury he was also informed by Claimant that he had been injured, but on a different day. (Tr. 204-205). The medical log book reflects Ms. Landry's injury occurred on March 3, 2005. Mr. Stann testified he did not know why he recorded March 3, 2005 as the date of injury, but represented that the date was incorrect. (Tr. 206-207; CX-16). He could not explain why Claimant's report of injury was not recorded on March 3, 2005, but that it should have been so recorded. (Tr. 207-208).

Mr. Stann prepared a handwritten undated note with Ms. Landry's accident/injury information and a description of the aid provided. (Tr. 209-210; EX-26). He prepared a similar handwritten note about Claimant's accident/injury which is missing from Employer's records. (Tr. 210). He and Hank Santos sat down and tried to come up with dates of the events. He confirmed Claimant informed him that he fell on a barge on March 3, 2005. (Tr. 212). In his statement, he identified the barge on which Ms. Landry was injured as Energy Barge 8 and the barge on which Claimant was injured as an open container barge OB816. (CX-19, pp. 8-9). However, Ms. Landry was working on barge OB816 on March 3, 2005, when she was injured, which did not have cut out holes into which she could fall. (Tr. 212; EX-30, p. 3).

Mr. Stann recalled Claimant informed him that he was on the barge when he fell and hurt his back and that was the reason he could not help Ms. Landry out of the hole following her accident. (Tr. 213). Claimant told him he was injured "a couple of days prior to [Ms. Landry]," "like a week or five days." (Tr. 214). He explained that the Lost Causation Clues for Error Chain Analysis form maintained by Employer was prepared by he and Hank Santos back-tracking on dates of events. (Tr. 215-216; CX-13). The representation that Claimant reported his injury on March 3, 2005, "but the accident happen on 2/22/05" was a result of back-tracking and may not be accurate. (Tr. 216).

Claimant never informed Mr. Stann that he injured his back helping Ms. Landry. He never reported any other injuries other than his back injury made the subject of his claim. (Tr. 218). Mr. Stann is not aware of any injury to Claimant as a result of an air hose getting loose and injuring him. (Tr. 218-219). No such incident or injury was reported to Mr. Stann nor entered in the medical log book. (Tr. 219). Claimant reported falling down on a barge caused by a wake or wave from a passing boat. (Tr. 221).[17]

On cross-examination, Mr. Stann admitted he is not very good with dates. (Tr. 223). He affirmed he first learned of Claimant's accident/injury after he treated Ms. Landry for her injury, when Claimant reported that he could not help Ms. Landry out of the hole because his back was hurting. (Tr. 224, 241). Claimant informed Mr. Stann that he hurt himself prior to Ms. Landry's injury, and not the same day he reported his injury. (Tr. 225).

He confirmed that Claimant was the source of the information contained in the Error Chain Analysis. He acknowledged that he did not have much confidence in the "2/22/05" date, which was probably wrong. (Tr. 226; EX-27). He did not provide any medical treatment to Claimant on the night he reported his injury because he was not complaining about back pain. Claimant was released back to work. (Tr. 231). Employer's Drydock and Construction log reveals that Ms. Landry and Claimant worked on the Energy barge on March 8, 2005, when Ms. Landry claimed to have injured herself. (Tr. 231; EX-30, p. 6). The document also indicates that Ms. Landry and Claimant worked for 2.5 hours on March 3, 2005, on the OB816 barge. (Tr. 232; EX-30, p. 3). Mr. Stann disagreed with Claimant's testimony that he reported his injury the very night he fell on the barge. (Tr. 233).

Mr. Stann testified he worked the night of March 3, 2005. (Tr. 233). He would have set up lighting for night work on the OB816 barge and the mooring lines of the OB816 barge were tied close to the dock on the night of March 3, 2005. He would have

[17] In his statement, he confirmed that Claimant did not report any wake causing the barge to rock. (CX-19, p. 4).

had the mooring lines pulled in if they were loose. He did not observe a cruise ship or pleasure vessel tied to the OB816 barge on March 3, 2005. (Tr. 237). He has seen mooring lines re-tighten because of tidal movement. (Tr. 241).

James Perry

Mr. Perry provided a recorded statement on April 26, 2005, and was deposed by the parties on April 25, 2006. (CX-21 and EX-14; CX-22). At hearing, Mr. Perry, Employer's drydock supervisor, testified that when Claimant reported his fall on a barge he sent him to "Sugarfoot." (Tr. 247, 249, 254, 256; CX-21, p. 17; CX-22, p. 27). He later confirmed that Claimant had reported his accident to Sugarfoot. (Tr. 250). He was uncertain of the exact date of the accident, but was certain Claimant reported his accident and was sent to Sugarfoot. (Tr. 255-256).

As drydock supervisor, if he observed a seven-foot gap between the dock and a barge, he would stop the job, tighten the mooring lines and secure the barge. (Tr. 256). However, he stated he has never seen such a gap while working. (Tr. 256-257). He stated a wake or wave could cause a barge to move around even if it is properly tied to the dock. (Tr. 246). The yard superintendent, Eddie Barnes, did not reprimand him for allowing loose mooring lines or gaps to exist. (Tr. 257).

He further stated he had no recollection of a cruise vessel or pleasure boat being tied to a barge while blasting operations were ongoing. (Tr. 257). To do so would be hazardous and unsafe and create sand and dust "all in their boat." (Tr. 258). Blasting operations would not have occurred with a cruise vessel or pleasure boat next to a barge. (Tr. 258-259). He confirmed that the Cotton Blossom was in the yard on March 3, 2005. (Tr. 260).

Eddie Barnes, Jr.

Mr. Barnes was deposed by the parties on April 26, 2006, and also testified at the formal hearing. (CX-28). Mr. Barnes is Employer's yard superintendent and has worked for Employer for 34 years. (Tr. 262, 264). He acknowledged that a barge can move while moored to the dock; the looser the line the more movement occurs. (Tr. 262). He has never observed a blasting operation ongoing where a seven-foot gap existed between the dock and a barge. He did not reprimand Mr. Perry for allowing such slack to occur in the mooring lines. (Tr. 269). He

confirmed the Employer's policy is to report an injury to supervision when it occurs. On the night shift, in the absence of a supervisor, an employee would report to Sugarfoot who would take notes and give the notes to Hank, the safety man. (Tr. 263).

Mr. Barnes stated he had no role in the investigation of Claimant's accident. (Tr. 264). He denied calling Claimant into his office on March 4, 2005, and informing him that Sugarfoot had not properly prepared the accident report. He further denied informing Claimant that he (Barnes) needed to complete an accident report and, in fact, did not complete an accident report. (Tr. 265). He further denied telling Claimant that he needed to "tough it out and not report an accident," and did not tell Claimant not to seek medical attention. Employer's policy is if an accident occurs, "you have to report it." He denied telling Claimant "we don't need a loss time accident because it's going to affect our safety bonus." (Tr. 266).

Mr. Barnes also denied encouraging Claimant on a daily basis during the week of March 7, 2005, to tough it out and not seek medical attention. He first learned of Claimant's accident on March 14, 2005, when Claimant appeared at the guard shack "cursing and carrying on" about being hurt. (Tr. 267-268). He then took Claimant to Hank, the safety man. He did not take Claimant to Allen Stein and they did not encourage Claimant to tough it out, not record his accident, not see a doctor nor tell him "don't mess up out safety bonuses." (Tr. 268).

He confirmed that supervisors record employee time along with the job number for billing purposes. (Tr. 269-270).

Allen Stein

Mr. Stein was deposed by the parties on April 26, 2006, and testified at the formal hearing. (CX-27). Mr. Stein is the Operations Manager for Employer. (Tr. 274). His knowledge of Claimant's accident would come from the accident investigation reports and Hank Santos. (Tr. 275, 283; CX-14). He was aware of the allegations regarding Claimant's accident and injury as set forth in the investigative report. (Tr. 277). He did not know if the information contained in the report was true or not true. (Tr. 284). He agreed that barges can drift due to waves created by other vessels. (Tr. 278-279).

He denied meeting with Claimant at anytime to discuss his accident. He also denied telling Claimant to tough it out and not mess up the other employee's safety bonuses. (Tr. 285-286). Safety bonuses are given quarterly and are based on an incident rate compared to man hours worked. He did not think Claimant's injury would have a big impact on the rate. (Tr. 287-288).

Reco Sims

Mr. Sims was deposed by the parties on April 25, 2006, and testified at the formal hearing. (CX-30). He was Claimant's supervisor in March 2005. (Tr. 289). He testified that he had never seen Employer's First Report of Injury on Claimant and did not provide any information for the document despite the notation on the form that he did. (Tr. 290; CX-1). He had no first hand knowledge of Claimant's fall on the barge and thinks he left early the night of the accident. (Tr. 291). He has never spoken to Claimant or anyone else at Employer about Claimant's accident. (Tr. 293).

On cross-examination, he affirmed that his time sheet reveals he worked 10.5 hours on March 3, 2005. (Tr. 294; EX-30). He completed Claimant's time sheet for the same date which shows Claimant worked 2.5 hours. He could not recall Claimant reporting an accident to him on March 3, 2005. (Tr. 295). The same time sheet reflects that Claimant was sent home early since 5.5 hours were annotated as "NW" or "no work." He stated he keeps accurate time records and if Claimant had worked eight hours on March 3, 2005, he would have given him credit for such hours. Claimant did not complain to him about being shorted hours of work. (Tr. 296).

Hank Santos

Mr. Santos was deposed by the parties on April 26, 2006, and testified at the formal hearing. (CX-29). Mr. Santos is Employer's safety director/environmental coordinator. (Tr. 334). He has worked for Employer for 15 years. He stated he first learned of Claimant's injury on March 14, 2005, after Ms. Landry's accident/injury. (Tr. 302, 314). He confirmed that Sugarfoot should have logged Claimant's injury in the same day he was informed of the injury. (Tr. 303).

He testified that time sheets for March 2 and 3, 2005, were not properly completed. (Tr. 305; CX-12). The sheets did not total "worked and non-worked time." (Tr. 324). The time sheet for March 3, 2005, revealed Claimant worked only 2.5 hours.

(Tr. 324; EX-29). The time sheet for March 8, 2005, shows Claimant working eight hours on barge Energy VIII whereas the Drydock and Construction sheets reveal he only worked 5.5 hours, which Mr. Santos identified as a discrepancy. (Tr. 305-306; CX-11; CX-12). Claimant was given credit for all hours worked. (Tr. 325).

Mr. Santos stated that Reco Sims was identified as the source of information of Claimant's accident on the LS-202 only for purposes of tracking supervision. Mr. Sims did not provide any information about Claimant's accident/injury. (Tr. 306-307; CX-1). He confirmed that Sugarfoot annotated the Error Chain Analysis form to reflect that Claimant reported an accident on March 3, 2005, "but the accident was on February 22, 2005." (Tr. 310; CX-13). He recalls that Sugarfoot was not sure of the date, but gave the date of February 22, 2005; Claimant reported it was March 3, 2005. (Tr. 310). He did not speak with Sugarfoot about counting back days on a calendar to determine when Claimant's accident/injury occurred. (Tr. 311). He was not aware of any documentation that would indicate Claimant's injury occurred on February 22, 2005. (Tr. 313).

Mr. Santos testified that the Harvey Canal lock and Jefferson Marine records would show 99% of the vessel traffic in the Harvey Canal on March 3, 2005. (Tr. 315-316). He did not receive any supervisory field reports of any other traffic, such as joy riders, in the Harvey Canal at 11:45 p.m. on March 3, 2005. (Tr. 330).

On March 14, 2005, Mr. Santos spoke with Claimant who reported falling on the barge and injuring his back when a wake moved the barge. (Tr. 317).

On cross-examination, Mr. Santos testified that he had reason to question Claimant's reported accident because of the traffic issue or the lack of traffic; Ms. Landry reporting that Claimant was injured when a hose hit him and he reported falling on the barge; the discrepancy in the date of accident/injury which never added up since Claimant was not working at the time he alleged the accident occurred on March 3, 2005. (Tr. 319-320). Claimant only worked 2.5 hours on March 3, 2005, as did Ms. Landry and Mr. Hawkins. (Tr. 320-321; EX-29; EX-30). The Employer's Work Order or Repair Specification sheet also reflects that Claimant and Ms. Landry worked 2.5 hours on March 3, 2005. (Tr. 321-322; EX-33, p. 7). Claimant, Ms. Landry and Mr. Hawkins never complained to him about being underpaid for the hours worked on March 3, 2005. (Tr. 325).

On March 14, 2005, he transported Claimant to seek medical treatment at the Occupational Medical Center. (Tr. 317). Claimant was given a light duty statement by the doctor. (Tr. 326).

Mr. Santos did not interview Mr. Hawkins about his knowledge of Claimant's accident/injury. (Tr. 331). He had no knowledge of a misplaced written note from Sugarfoot regarding Claimant's accident. (Tr. 333).

Anthony Saul

Mr. Saul provided a recorded statement to Mr. Ronald Cambre on April 8, 2005. (CX-34). He recalled Claimant complaining that he had "slipped some kind of way" and fell on a barge and his back was hurting. He told Claimant to report the accident to Sugarfoot. (CX-34, pp. 5-6). He recalled Olivia Landry's accident and placed Claimant's accident before Ms. Landry's accident. (CX-34, p. 10). He also recalled Claimant assisting Ms. Landry after she fell into a hole of the barge. (CX-34, p. 13).

Don Palmintier

Mr. Palmintier was deposed by the parties on May 2, 2006, and testified at the formal hearing. (CX-33). Mr. Palmintier is Employer's Claims Administrator. (Tr. 356). He became involved in Claimant's case when advised that there was a dichotomy in the medical opinions of Dr. Nelson-light duty versus no duty release. (Tr. 357). He obtained a statement from Claimant in which Mr. Hawkins was not mentioned as a witness. (Tr. 358-359; EX-9). Ms. Landry was identified by Claimant as having knowledge of his accident/injury and also suffering an incident as well. (Tr. 359-360).

Mr. Palmintier also obtained a statement from Ms. Landry who stated she saw Claimant get hurt when he got tangled up in a hose and fell down inside the barge. (Tr. 361). He then conducted a claims investigation into the time sheets, Harvey Canal traffic and medical log which caused him to recommend that Claimant's claim be controverted. (Tr. 363-369).

Mary Beth O'Neill

Ms. O'Neill was deposed by the parties on May 2, 2006, and testified at the formal hearing. (CX-32). Ms. O'Neill is a senior adjuster for F. A. Richard & Associates, the third party administrator for Carrier. (Tr. 380-381). She testified that she retained an investigator to conduct surveillance of Claimant in view of "several red flags" in his claim. (Tr. 382-383.) She concluded the surveillance revealed Claimant performing physical activities that contradicted his reports to physicians. She controverted the claim on April 4, 2005. (Tr. 383).

Richard D. Lyons

Mr. Lyons was deposed by the parties on May 2, 2006. (CX-31). He is a licensed investigator who was retained by Carrier to perform surveillance on Claimant. (CX-31, p. 6). He attempted surveillance of Claimant on sixteen occasions from March 22, 2005 through May 21, 2005. (CX-31, pp. 32-46; EX-19).

Mr. Lyons performed video surveillance of Claimant on six occasions. (EX-34). The video evidence shows Claimant bending over and picking up articles in his yard (CX-31, p. 9), walking across the street and bending over several times (CX-31, p. 10), climbing into and riding as a passenger in the bed of a pick-up truck (CX-31, p. 15), walking his "little bitty dog" (CX-31, p. 19), carrying a small child in his arms (CX-31, pp. 19-20), carrying a large dog (CX-31, p. 21), and on May 21, 2005, loading up a large TV set into the back of a truck with assistance from another individual. (CX-31, pp. 22-23).

The Medical Evidence

Dr. Howard A. Nelson

Dr. Nelson was deposed by the parties on January 6, 2006. (CX-41; EX-11). He is board-certified in general surgery, but engages in office practice doing occupational and industrial medicine. (CX-41, p. 5).

He examined Claimant on three occasions at the request of Employer. The first on March 14, 2005, when Claimant related a fall at work ten days before where he landed on his tail bone and lower back and complained of pain radiating down his right leg. In his "significant past history," Claimant indicated "not applicable" in response to any pre-existing low back problems. (CX-41, pp. 6-7; EX-1, p. 10). On physical examination,

Claimant had a stiff back with spasm and a positive straight leg raising test. His x-rays revealed narrowed L4-5 and L5-S1 discs. (CX-41, p. 8). He opined that Claimant's symptoms were not "fake." (CX-41, p. 9). He observed that inflammation around a defective disc and nerve root can cause symptoms. (CX-41, p. 41).

Dr. Nelson opined that Claimant's fall "could have triggered the disc becoming symptomatic." Although the fall did not cause the degenerative disc disease, the trauma put extra stress on the discs and caused the disc to bulge further and press against the nerve root. (CX-41, p. 13). Claimant was released to modified duty with no lifting over five to ten pounds, ground level work only, no ladders or heights, no repeated bending, stooping, squatting, pushing, jerking, twisting or bouncing. (CX-35, p. 3; CX-41, p. 18; EX-1, p. 12).

On March 16, 2005, Claimant was again examined with the same symptoms and no changes in condition. (CX-41, p. 14). Dr. Nelson recommended an MRI and placed Claimant on no work indefinitely. (CX-35, p. 4; CX-41, p. 15). On March 21, 2005, Dr. Nelson received the MRI interpretative report which indicated Claimant had a herniated disc with right nerve root impingement. In his opinion, the cause of the herniation was consistent with Claimant's history of injury. (CX-41, p. 16; CX-36). He recommended that Claimant be referred to a neurosurgeon, Dr. Culicchia. (CX-41, p. 17). He did not believe Claimant had reached maximum medical improvement at this time. (CX-41, p. 35).

Dr. Nelson stated it is "likely" that Claimant suffered a herniated disc at L5-S1 which was causally related to his fall at work. (CX-41, p. 20). He acknowledged that a herniated disc can be caused as a result of trauma, degenerative disc disease or a combination of both. (CX-41, p. 30). Degeneration can be accelerated by obesity, heavy manual labor, and other physical activities. (CX-41, pp. 31-32). He would prefer to treat Claimant conservatively and would defer to the opinion of the treating neurosurgeon. (CX-41, p. 34). He indicate he would place lifting restrictions of less than 50 pounds on a person who has had a symptomatic herniated disc, but would not generally do so even when the patient's symptomatology has improved. (CX-41, pp. 37-38). Claimant's restrictions are permanent in nature. (CX-41, p. 39).

Dr. Nelson opined that Claimant suffered from degenerative disc disease and his work accident caused his condition to be aggravated. (CX-41, pp. 42-44).

Westbank Health Care Center

On April 5, 2005, Dr. Michael A. Chambers examined Claimant at the request of Counsel for Claimant. Claimant presented with lower back pain, right sciatica and chronic headaches. Claimant reported an eight to ten foot fall on a barge as a passing boat struck the barge causing him to land on his back. Claimant informed Dr. Chambers that he was taken to West Jefferson Medical Center at the time of the accident. (CX-37, p. 13). Dr. Chambers's clinical impressions were acute bilateral cervical, trapezius, sternocleidomastoid, thoracic and lumbar paraspinous muscle spasm and post-traumatic headaches. (CX-37, p. 14). Claimant was advised not to return to work, was prescribed therapy and medications and referred to Dr. Vogel for a neurological consult. (CX-37, p. 15).

On July 28, 2005, Claimant returned to Dr. Chambers with continuing complaints of lower back pain radiating down his right leg. Examination revealed persistent spasm. A continuation of the initial modality treatments was directed. (CX-37, p. 12). No work limitations were assigned. (CX-37, p. 2).

Dr. Kenneth E. Vogel

Dr. Vogel was deposed by the parties on January 9, 2006. (CX-42). He initially examined Claimant on May 3, 2005, for evaluation of low back and right leg pain based on a referral from Dr. Chambers. Claimant provided a history of a work accident while getting off of a barge which "was thrown into a wake and he was thrown 10 feet to the metal deck below." Claimant reported experiencing "immediate low back pain associated with right leg pain." (CX-42, p. 5). He described his pain as constant rather than intermittent. (CX-42, p. 7). His pain was verified by objective neurologic findings on exam. (CX-42, p. 8). Physical exam revealed moderate limitation of motion of the low back, a mild degree of right-sided muscle spasm and positive straight leg raising on the right. (CX-42, p. 10). Muscle spasm was the only objective finding. (CX-42, p. 11).

Dr. Vogel reviewed the MRI films and stated that a central left herniation was shown at the L4-5 level and a central right herniation with facet arthrosis at L5-S1. The herniation at L4-5 was a disc protrusion type herniation. (CX-42, p. 6). Claimant's objective findings were consistent with the MRI results. (CX-42, p. 12).

Dr. Vogel opined that in all probability Claimant's symptoms were causally related to his work accident based on his history, MRI and neurologic examination. (CX-42, p. 13). On May 3, 2005, Dr. Vogel recommended continued conservative care for Claimant. (CX-42, p. 16). He determined that Claimant was disabled from his normal work duties based upon his history, physical exam and his MRI results. (CX-42, p. 24).

On May 24, 2005, Dr. Vogel reexamined Claimant who had the same symptoms plus his right leg was giving way. Findings were essentially the same with the exception of positive straight leg raising now being bilaterally. (CX-42, p. 17). Dr. Vogel recommended a lumbar discogram/CAT scan to determine if Claimant's herniated discs were causing his symptoms. Pending the outcome of the diagnostic testing, he opined Claimant may be a surgical candidate. (CX-42, p. 18). The testing was not accomplished. (CX-42, p. 19). He further opined that patients become surgical candidates when their pain becomes intractable. (CX-42, p. 23).

Dr. John C. Steck

Dr. Steck was deposed by the parties on December 19, 2005. (CX-43). He is board-certified in neurosurgery. (CX-43, p. 5). He examined Claimant on one occasion on June 23, 2005, apparently at the behest of the Carrier. Claimant reported landing on his back on a barge at work on March 3, 2005, when "another boat came" throwing up a wave and throwing him ten feet into the air. He felt numbness in his back and legs. Claimant presented to Dr. Steck with complaints of severe back pain, right leg pain, numbness in the right leg. (CX-43, p. 11; CX-39, p. 1; EX-2, p. 1). He also informed Dr. Steck that before his work accident he was in good shape and had no previous back or leg pain. (CX-43, p. 12).

On physical exam, Claimant had a positive straight leg raise on the right, but normal neurological and sensory exams. (CX-43, p. 13). Dr. Steck reviewed the MRI film which he interpreted as showing a congenitally small spinal canal with a broad-based disc protrusion central at L4-5 with significant

spinal stenosis, and a broad-based posterior right-sided disc protrusion which was causing compression and displacement of the right S1 nerve root. (CX-43, p. 15; CX-39, p. 2). Dr. Steck testified that the most likely cause of Claimant's symptoms on that date was the disc abnormality at L5-S1. He considered the findings to be degenerative in nature which were pre-existing conditions. (CX-43, p. 17).

Dr. Steck opined that, of the various possible causative scenarios, the most likely is Claimant's pre-existing arthritic back condition was made symptomatic when he had his work injury. (CX-43, pp. 18-19). His opinion is based on his physical exam of Claimant, the history presented and a review of the diagnostic test results. (CX-43, p. 22).

On cross-examination, he recommended that Claimant have a series of epidural steroid injections (two) at an approximate cost of $600.00 each. (CX-43, pp. 27, 31). He opined that there was "not much difference" between falling ten feet and being thrown in the air ten feet. (CX-43, p. 29). He stated that by history Claimant reported he fell and afterwards developed a pain syndrome. (CX-43, p. 30). He opined that if Claimant's symptomatology remained unchanged he "might consider surgery, a two-level decompression diskectomy." (CX-43, p. 32).

He testified that he could not state with certainty whether the protrusion at the L4-5 level was traumatically induced or degenerative in nature, but it is much more likely that it was degenerative in nature. (CX-43, p. 35). Such a pre-existing condition could have been aggravated by Claimant's work accident. (CX-43, p. 36). Dr. Steck would have taken Claimant off work while the epidural injections were being done and then maybe return him to sedentary work to allow healing. (CX-43, p. 37).

Dr. Barry L. Bordonaro

On June 20, 2003, Claimant treated with Dr. Bordonaro for neck and back pain suffered in a motor vehicle accident on June 18, 2003. Claimant reported he had been involved in another motor vehicle accident in 2000 where he injured his back and right arm, but had fully recovered. (EX-3, p. 2). Dr. Bordonaro diagnosed Claimant with cervical spine sprain, thoracic spine sprain and lumbar spine sprain and prescribed therapy and medications.

Claimant treated with Dr. Bordonaro on July 14, 2003, August 27, 2003 and September 10, 2003, at which time his symptoms had resolved. (EX-3, p. 3).

Dr. Gregory J. Volek

Claimant presented to Dr. Volek on June 29, 1998, for treatment of persistent pain in the neck and back from injuries suffered when sheet rock at a motel fell down on his shoulders. He was diagnosed with acute traumatic cervicodorsal sprain/strain with attending paravertebral myofascitis. He was discharged from care on July 17, 1998. (EX-4, p. 8).

The Vocational Evidence

Bobby Roberts

On May 4, 2006, Mr. Roberts evaluated Claimant at the request of Claimant's counsel to determine the current levels of vocational functioning and future employability. (CX-44). He administered various testing to include the WRAT-RIII, a measure of academic achievement, the Symptoms Checklist-90 and MESA test battery. He opined that Claimant had a learning disability and was deficient in reading and spelling, his personality factors profile was extremely elevated and he scored below the anticipated level at which short term rehabilitation efforts would yield positive results. (CX-44, pp. 2-4).

Mr. Roberts opined that based on the foregoing Claimant was not presently meeting the criteria for competitive employment and is in need of on-going medical and rehabilitation services. Based on typical restrictions after back surgery, which Claimant has not yet undergone, he opined that Claimant's return to medium, heavy or very heavy work was non-existent. He further opined Claimant's vocational prognosis for light work is considered guarded to poor because he had no skill or reading ability to perform light work. (CX-44, p. 5).

Carla Seyler

Ms. Seyler, a certified and licensed vocational rehabilitation counselor, testified at the hearing and was accepted as an expert in her field. On May 5, 2006, she rendered a vocational report based on her review of vocational and medical records provided by Employer/Carrier. (Tr. 336-337; EX-18).

Based on her review of the records, she opined that Claimant could perform sedentary work, lifting five to ten pounds with restrictions from bending, stooping, squatting, pushing, jerking, twisting and bouncing. She observed that Dr. Nelson indicated "at a later date" Claimant would be allowed to work lifting no more than 50 pounds. (Tr. 341).

She opined that vocational counselor Bobby Roberts administered testing with the WRAT, MESA and Symptoms Checklist to determine Claimant's word recognition and not reading comprehension and Claimant's self-report inventory. (Tr. 343-344). She was unable to meet with Claimant, but would have administered a reading comprehension test, a math test and vocational interests testing. (Tr. 345).

She opined that, based on the medical opinions, Claimant was capable of at least sedentary work and in the future perhaps more strenuous work. (Tr. 345). She further opined that Claimant had transferable skills to perform sedentary type employment. (Tr. 346).

She performed labor market surveys in Baton Rouge and New Orleans, Louisiana, since she did not know where Claimant was residing at the time of her surveys. (Tr. 347). She identified six jobs in the Baton Rouge, Louisiana area as follows: (1) a sedentary call center worker; (2) a light demand general laborer; (3) a light busser position; (4) a light lens lab technician; (5) a medium demand warehouse worker; and (6) a medium demand warehouse delivery worker. (Tr. 347-348; EX-18). She also identified nine jobs in the New Orleans, Louisiana area as follows: (1) a sedentary cashier/parking department position; (2) a sedentary parking lot cashier; (3) a light general laborer position; (4) a light janitorial job; (5) a medium maintenance and setup technician; (6) a medium utility position; (7) a medium laundry and linen extractor job; (8) a medium order picker job; and (9) a medium tow truck driver job. (Tr. 347-348).

On cross-examination, Ms. Seyler confirmed that Claimant could read at least at the sixth grade level which was very common for his former work. His former work as a sandblaster was considered medium work. (Tr. 350). She affirmed that she had access to Dr. Vogel's records after she rendered her

vocational report and that he raised the possibility of surgery for Claimant contingent upon additional diagnostic testing. (Tr. 351-352). She did not issue a supplemental report after reviewing Dr. Vogel's records, but his opinions did not change her vocational opinion. (Tr. 354-355).

The Contentions of the Parties

Claimant contends he injured his back on March 3, 2005, while working as a blaster/painter for Employer. He alleges he fell off of a ladder when a passing vessel created a wake that caused the barge on which he was working to rock dislodging him from the top of the barge onto his back. He contends he needs medical care and treatment including lumbar surgery as a result of the accident.

Employer/Carrier contend that Claimant was not at work on March 3, 2005, at the time he claims his accident/injury occurred. They argue that significant inconsistencies exist and surveillance conducted reveals contradictions in Claimant's activities which cause them to dispute the existence of an accident as alleged. They further argue that Claimant's November 15, 2005 motor vehicle accident constitutes an intervening and superseding event which relieves Employer/Carrier of liability in this matter.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale

Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct 1965, 1970 n. 3 (2003)(in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference)(citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980)("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

An administrative law judge can properly discredit the testimony of a claimant and find that the evidence fails to establish the existence of an injury. Mackey v. Marine Terminals Corp., 21 BRBS 129 (1988). An administrative law judge may also accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); see also Plaquemines Equipment & Machine Co. v. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972).

A. Claimant's credibility

I find Claimant's case riddled with inconsistencies about the time and date of occurrence of his accident, his educational achievements, and prior back injuries. His corroborative witnesses do not lend much credence to his version of the facts.

Internal inconsistencies abound in Claimant's testimony. He testified that he completed the tenth grade of high school, but represented on his application and at deposition that he completed the twelfth grade and had graduated from high school. He was adamant that his work accident occurred at the end of his shift or about 11:45 p.m., on March 3, 2005, yet the Employer's

time and construction records reveal he only worked 2.5 hours on March 3, 2005, which would have ended his shift at about 6:30 p.m.

Nevertheless, Claimant consistently described his accident to his supervisors and treating and consulting physicians as a fall from a ladder while exiting his work barge. However, his corroborative witnesses described different events, particularly Ms. Landry who observed a sandblasting hose wrestling episode which caused Claimant to fall. She later recalled Claimant falling from a ladder because of a wake, but that Claimant did not complain about a back injury as a result. Mr. Hawkins expressed confusion about when he observed Claimant fall, initially noting an 8:30 p.m. or lunch time fall and changing the time to 11:45 p.m., and that Claimant fell inside the barge whereas Claimant stated he fell outside the barge. Claimant's recollection of the wake or wave which caused the barge on which he was working to rock or move also varied from a tug boat to a tug boat pushing four tows. Mr. Hawkins recalled seeing a Jefferson Marine tug (red tug) mooring across the canal and a white tug causing waves in the canal, which is not consistent with the Harvey Lock or Jefferson Marine records. However, the commonality in testimony between Claimant and Mr. Hawkins reveals Claimant fell while exiting a barge.

Claimant initially testified that he reported his accident/injury to Reco Sims on the night of its occurrence. Mr. Hawkins stated he witnessed Claimant reporting his accident to Sims. However, Claimant later recanted stating Sims had left work early, and he reported his accident to Sugarfoot. Reco Sims worked ten hours on March 3, 2005. Ms. Landry stated Sugarfoot was not present on March 3, 2005.

Incredibly, Claimant denied ever having hurt his back before March 3, 2005, either on or off the job. He deposed that before his March 3, 2005 accident, he had never sought back treatment, never complained of back pain to any health care professional, never experienced back pain and had never had any prior back injuries. The medical records of Drs. Bordonaro and Volek belie Claimant's assertions.

Contrary to Employer/Carrier's assertions, Claimant's deposition testimony taken for his 2005 motor vehicle accident did not create a conflict in medical causation. His job-related

medical condition had been ignored by Employer/Carrier. There is no evidence that the recommendations made by his treating and consulting physicians have changed as a result of his subsequent motor vehicle accident.

The foregoing constitutes a valid basis for diminishing the weight to be placed on the credibility of Claimant. I find that because of the internal inconsistencies and contradictions in his recorded statement, depositions and hearing testimony, when correlated with his corroborative witnesses and documentary evidence, Claimant's hearing testimony was generally incredible and unpersuasive as to the details of his accident. He is clearly a poor historian. However, I found his testimony at hearing to be more a result of confusion than an intentional effort to deceive.

In sum, I find that his inconsistent and uncorroborated statements, his contradictory testimony that he had never had any back injuries nor complained of or sought treatment therefor, support a conclusion that Claimant's recollection regarding the details of his allegations of a March 3, 2005 accident are unreliable and not supported by his testimony and that of his supporting witnesses.

B. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary- that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm

or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a **prima facie** case that the injury occurred in the course and scope of employment, or conditions existed at work which could have caused the harm. Bonin v. Thames Valley Steel Corp., 173 F.3d 843 (2nd Cir. 1999)(unpub.)(upholding an ALJ ruling that the claimant did not produce credible evidence that a condition existed at work which **could have caused** his depression); Alley v. Julius Garfinckel & Co., 3 BRBS 212, 214-15 (1976); Smith v. Cooper Stevedoring Co., 17 BRBS 721, 727 (1985)(ALJ). It is claimant's burden to establish each element of his **prima facie** case by affirmative proof. Stevens v. Tacoma Boatbuilding Co., 23 BRBS 191 (1990); Kooley v. Marine Industries Northwest, 22 BRBS 142 (1989).

In the present matter, since I have concluded that Claimant's testimony is generally not credible, evidence besides his uncorroborated testimony regarding the alleged March 3, 2005 accident is necessary to establish Claimant's **prima facie** case.

1. Claimant's Prima Facie Case

Notwithstanding discrepancies in time and date of accident, Claimant and Mr. Hawkins have uniformly described Claimant's fall on a barge at work. Moreover, the external medical evidence of record supports Claimant's allegation that he suffered a back injury while working on a barge for Employer. Drs. Nelson, Vogel and Steck opined objective medical evidence supports a finding that Claimant suffered an aggravation of an existing condition and Claimant's history of a fall could have triggered pre-existing back problems. Each physician has opined that Claimant's herniated disc was more "likely" causally related to his work accident. Thus, the medical evidence of

record corroborates objective symptoms of injury and causation for Claimant's back injury.

Thus, I find Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on or about March 3, 2005, and that his working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

The burden shifts to the employer to rebut the presumption with **substantial** evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work

events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra at 147-148.

Employer/Carrier argue that the presumption "may lie dispelled by circumstantial evidence specific enough to sever the potential relationship between an alleged injury and a job-related event." Based on the inconsistencies shown in the times and dates of the alleged accident, Employer/Carrier submit that Claimant only work 2.5 hours on March 3, 2005, and was not present at the work place at 11:45 p.m. when he claims he was injured on a barge. He presented no evidence refuting the time cards, Dry Dock and Construction Records or the Project records. They further assert that at no time prior to Ms. Landry's accident on March 8, 2005, were she and Claimant working together at 11:45 p.m. on any night.[18] Thus, they argue the records are substantial evidence contradicting Claimant's claim and he is not entitled to the Section 20(a) presumption.

The record is devoid of any medical evidence that Claimant's injury was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. There are no medical opinions that support a conclusion of an absence of causation in this matter.

Assuming, **arguendo**, that Employer/Carrier have rebutted Claimant's **prima facie** case, I must weigh all of the relevant record evidence to resolve the causation issue.

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[18] However, time records for March 1, 2005, show Ms. Landry and Claimant worked for eight hours on the Cotton Blossom. (EX-30, p. 1). Arguably, they also worked together on February 2, 2005 (EX-23, p. 2), February 3, 2005 (EX-23, p. 3), February 4, 2005 (EX-23, p. 4), February 5, 2005 (EX-23, p. 5), February 9, 2005 (EX-23, p. 7), February 10, 2005 (EX-23, p. 14), and February 11, 2005 (EX-23, p. 15).

3. Weighing All the Evidence

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

I find Employer/Carrier's sole reliance upon circumstantial evidence that Claimant did not establish causation for his back injury is not persuasive. Although Employer investigated Claimant's allegations and concluded that the details as related were not supported by the time cards and canal traffic, no probative explanation for the disappearance or its efforts to locate Mr. Stann's note of Claimant's reported accident/injury was ever advanced.

Employer/Carrier presented equally confusing and equivocal testimony. Mr. Stann testified that he recorded Ms. Landry's accident on March 3, 2005, the day she reported it, and was then informed of Claimant's injury. (See CX-16). He and Mr. Santos added that Claimant's accident/injury should have been recorded on March 3, 2005 as well, and offered no explanation for its omission. Although Mr. Stann claimed to have conferred with Mr. Santos to determine when Claimant may have suffered his accident/injury, Mr. Santos disputed the testimony of back-tracking the date. Mr. Stann acknowledged that Claimant told him he fell and was injured on a barge a few days before Ms. Landry's accident. He further confirmed that the February 22, 2005 date set forth in the Error Chain Analysis may not be accurate and was probably wrong.

Mr. Santos verified that Claimant informed him on March 14, 2005, of his accident and injury which occurred prior to that date. Mr. Perry also affirmed that Claimant reported a fall on a barge, but could not recall the exact date of the accident. He, Mr. Barnes and Mr. Stein confirmed that a barge can and does drift/move away from its mooring. Although Mr. Reco believed he left work early on March 3, 2005, his time card reveals he worked 10.5 hours.

A consensus of the testimony establishes that Claimant suffered a fall at work on a barge. Although there is a discrepancy about the date and time of accident, I find the record supports a conclusion that Claimant suffered a fall at

work on a barge and reported the injury, arguably on March 3, 2005, according to the medical log and Mr. Stann's recollection.

Moreover, there is no contrary, cogent medical evidence reflecting Claimant's injury could have been caused by any other event. The consensus of medical probability and opinion, based only in part on Claimant's history, supports a finding that Claimant's back injury was caused by a fall at work, whether specifically described by the correct time or date, which caused his pre-existing degenerative disc disease to become aggravated.

On March 14, 2005, Dr. Nelson noted that Claimant reported a fall at work ten days before and exhibited objective signs of pain and injury with spasm and positive straight leg raising. He specifically opined that Claimant's symptoms were not "fake," and inflammation around the discs and nerve root could have been caused by his fall at work. His interpretation of the MRI revealed a herniated disc with nerve root impingement on the right which was consistent with Claimant's history of injury. He further opined that the fall could have caused aggravation of Claimant's degenerative disc disease.

On May 3, 2005, Dr. Vogel observed objective neurological findings with spasm and opined that such findings were in all probability casually related to Claimant's fall. On June 23, 2005, Dr. Steck opined that Claimant's pre-existing degenerative findings were made symptomatic from his work injury. His opinions were based in part on Claimant's history, but also on his physical examination and diagnostic testing.

Furthermore, Employer's own records support a finding that Claimant reported a fall and injury on or about March 3, 2005. The absence of Mr. Stann's written note documenting Claimant's fall and injury detracts from its argument that an accident/injury did not occur as alleged. Given the record evidence, I find and conclude that Claimant established he suffered a fall on a barge on or about March 3, 2005, which could have caused pain and injury and thus sustained a compensable injury.

C. Nature and Extent of Disability

Having found that Claimant suffers from a compensable injury, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

D. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Claimant continued to report for work, albeit modified, during the week after his fall. He sought medical care on March 12, 2005, at the West Jefferson Hospital emergency room. On March 14, 2005, Dr. Nelson placed him on modified duty until March 16, 2005, when he was taken off work entirely. Dr. Nelson assigned permanent restrictions of no lifting over five to ten pounds, ground level work only, no ladders or heights, no repeated bending, stooping, squatting, pushing, jerking, twisting or bouncing that would preclude his former work as a sandblaster/painter, which was considered medium work by Ms. Seyler.

On April 5, 2005, Dr. Chambers also instructed Claimant not to return to work. On May 3, 2005, Dr. Vogel opined that Claimant was disabled from his normal work duties. Dr. Vogel recommended a lumbar discogram/CAT scan to determine if Claimant's herniated discs were causing his symptoms. If so, he

opined Claimant may potentially be a surgical candidate. None of Claimant's treating physicians have opined that he has reached maximum medical improvement.

On June 23, 2005, Dr. Steck recommended a series of epidural injections which were never approved. He would have taken Claimant off work while the epidural injection series was being performed and may have returned him to sedentary work thereafter to allow healing.

Based on the foregoing medical and vocational opinions, I find that Claimant is totally disabled from his former job as a sandblaster/painter. Since diagnostic testing and an epidural injection series were recommended by Drs. Vogel and Steck, respectively, I further find that Claimant has not reached maximum medical improvement and thus is temporarily totally disabled. As such, he is entitled to total disability compensation benefits from March 16, 2005, when he was taken off all work by Dr. Nelson, based on his average weekly wage of $321.75, as discussed below.

E. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., supra at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., supra at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, supra at 1042-1043; P & M Crane Co., supra at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, supra at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

Mr. Roberts opined, based on testing, that Claimant did not meet the criteria for competitive employment in May 2006. He further opined that Claimant had no skill or reading ability to perform work at the light, and presumably sedentary, level.

Ms. Seyler, on the other hand, opined that Claimant could perform sedentary work within the restrictions assigned by Dr. Nelson and possibly at a heavier level "at a later date." She did not review Dr. Vogel's medical opinions before her report, but at hearing indicated she had done so thereafter. Inexplicably, Dr. Vogel's medical opinions did not change her vocational opinion. She discounted Mr. Roberts's testing as outdated or not constructive.

On May 6, 2006, she identified one sedentary job in Baton Rouge, Louisiana as a call center worker which comports with Claimant's restrictions and paid $7.00 to $8.00 an hour. The remaining five jobs were light to medium in physical demand which clearly exceeds Claimant's permanent restrictions and would constitute unsuitable employment. She also identified two sedentary jobs in New Orleans, Louisiana as a cashier/parking department employee paying $7.50 an hour and a parking lot cashier paying $8.00 to $8.50 an hour. The remaining seven positions were light to medium in physical demand and exceeded Claimant's permanent restrictions.

Dr. Steck's lone opinion provides that Claimant "may be" capable of performing sedentary work **after** a series of epidural injections, which were never administered. As previously noted the consensus of medical opinion is that Claimant should not return to work and has been taken off work pending diagnostic testing, which has never been scheduled or approved.

Accordingly, in view of the foregoing, I find Claimant continues to be totally disabled and has not reached maximum medical improvement. Furthermore, it has not been established that Claimant has been released to return to any work or medically able to seek work given the medical opinions of his treating physicians. See Bryant v. Carolina Shipping Company, 25 BRBS 294, 296-297 (1992). Thus, I conclude he continues to be temporarily totally disabled since March 16, 2005.

F. Intervening Cause

Employer/Carrier argue Claimant's 2005 motor vehicle accident constitutes an intervening cause which terminates their liability for his work-related condition.

If there has been a **subsequent non-work-related injury or aggravation**, the employer is liable for the entire disability if the second injury is the natural or unavoidable result of the first injury. Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (CRT)(5th Cir. 1981); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (9th Cir. 1954)(if an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986).

If, however, the subsequent injury or aggravation is not a natural or unavoidable result of the work injury, but is the result of an intervening cause such as the employee's intentional or negligent conduct, the employer/carrier is relieved of liability attributable to the subsequent injury. Bludworth Shipyard v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT)(5th Cir. 1983); Cyr v. Crescent Wharf & Warehouse Co., supra; Colburn v. General Dynamics Corp., 21 BRBS 219, 222 (1988); Grumbley v. Eastern Associated Terminals Co., 9 BRBS 650 (1979); Marsala v. Triple A South, 14 BRBS 39, 42 (1981).

Where there is no evidence of record which apportions the disability between the two injuries it is appropriate to hold employer/carrier liable for benefits for the entire disability. Plappert v. Marine Corps Exchange, 31 BRBS 13, 15 (1997), aff'd 31 BRBS 109 (en banc); Bass v. Broadway Maintenance, 28 BRBS 11, 15-16 (1994); Leach v. Thompson's Dairy, Inc., 13 BRBS 231 (1981).

Moreover, if there has been a subsequent non-work-related event, an employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that Claimant's condition was caused by the subsequent non-work-related event; in such a case, employer must additionally establish that the first work-related injury did not cause the second accident. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989).

The U.S. Fifth Circuit Court of Appeals has set forth "somewhat different standards" regarding establishment of supervening events. Shell Offshore, Inc. v. Director, OWCP, 122

F.3d 312, 31 BRBS 129 (CRT)(5th Cir. 1997). The initial standard was set forth in Voris v. Texas Employers Ins. Ass'n., which held that a supervening cause was an influence originating entirely outside of employment that overpowered and nullified the initial injury. 190 F.2d 929, 934 (5th Cir. 1951). Later, the Court in Mississippi Coast Marine v. Bosarge, held that a simple "worsening" could give rise to a supervening cause. 637 F.2d 994, 1000 (5th Cir. 1981). Specifically, the Court held that "[a] subsequent injury is compensable if it is the direct and natural result of a compensable primary injury, as long as the subsequent progression of the condition is not shown to have been worsened by an independent cause."

In the present matter, Claimant's automobile accident was arguably the result of negligence, which caused the accident. There is no allegation nor any evidence that Claimant's work-related injury caused the accident. Accordingly, I find and conclude that Claimant's subsequent automobile accident was not the natural or unavoidable result of Claimant's work-related injury. Thus, the injury may constitute an intervening cause of a subsequent injury occurring outside of work to relieve Employer/Carrier of liability for the subsequent injuries.

There are no medical reports in evidence reflecting treatment after the motor vehicle accident. Claimant testified that he suffered tightness from the car accident and continued to take the medications prescribed for his work-related accident pursuant to Dr. Vogel's instructions.

Moreover, the medical evidence of record does not establish to what extent, if any, the possible intervening cause overpowered or nullified Claimant's original back condition since he has never reached maximum medical improvement from his job injury. An apportionment of Claimant's disability cannot be determined based on an absence of medical opinions. Accordingly, I find and conclude the medical evidence of record does not support an apportionment of Claimant's disability among his occupational injury and his motor vehicle injury/accident.

In light of the foregoing, I find and conclude there is no reasonable basis on which to apportion disability among Claimant's injuries. See Plappert, supra, at 110. Therefore, Employer/Carrier continue to be liable for Claimant's work-related back injury/disability.

G. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

The instant record contains no evidence that Claimant worked substantially the whole of the preceding year and is devoid of the earnings of similarly situated employees.

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

In Miranda v. Excavation Construction Inc., 13 BRBS 882 (1981), the Board held that a worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings because a calculation based on the wages at the employment where he was injured would best adequately reflect the Claimant's earning capacity at the time of the injury.

Claimant argues that his average weekly wage is $440.00 per week based on a 40-hour week at $11.00 an hour. The wage records of Claimant reveal that he only worked 40 hours in two of the eight weeks during his last period of employment with Employer before his injury. He averaged 29.5 hours a week. (CX-10). I find that to compute Claimant's average weekly wage in this manner would be a windfall to Claimant. Claimant also asserts that his wage should be calculated in a hybrid Section 10(a) manner by determining he worked 43 days during his employment with Employer which should be multiplied by 260 for a five-day per week worker. Claimant clearly did not work substantially the whole of the year and to employ such a computation as suggested by Claimant would be unreasonable and erroneous.

On the other hand, Employer/Carrier submit that Claimant's average weekly wage should be computed under Section 10(c) using his Social Security earnings for the year 2004 of $11,683.00, without further explication.

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., supra; Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning

capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

I conclude that because Sections 10(a) and 10(b) of the Act cannot be applied, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

Like Miranda, I also conclude that a calculation of Claimant's wages from the employment at which he worked when he was injured is the fairest and most accurate reflection of his earning capacity at the time of his injury. Thus, his payroll records reveal he earned $2,574.00 in his eight weeks of employment before his alleged injury or an average of $321.75 per week. Accordingly, I find Claimant's average weekly wage at the time of his injury was $321.75 with a corresponding compensation rate of $214.51 ($321.75 x .6667).[19]

H. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

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[19] Since Claimant's average weekly wage is less than 50% of the national average weekly wage of $523.58, he is entitled to the average weekly wage calculated under Section 10 of the Act. 33 U.S.C. § 906(b)(2).

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

Since I have found that Claimant established a **prima facie** case of a compensable injury, Employer/Carrier are responsible for reasonable and necessary medical care and treatment as recommended by treating and consulting physicians. Dr. Vogel recommended diagnostic testing to determine if Claimant's symptoms were being caused by a herniated disc. Dr. Steck recommended a series of epidural steroid injections. Neither recommendation was approved. Under the circumstances of this case, I find both recommendations are reasonable and necessary to provide Claimant with medical care and treatment which is the liability of the Employer/Carrier. Employer/Carrier are also responsible for any further residual medical care and treatment recommended after the foregoing diagnostic testing and injections, including surgery if deemed warranted, resulting from Claimant's accident/injury on or about March 3, 2005.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Claimant alleged an injury on March 3, 2005. I have found that Claimant notified Employer of his accident/injury on March 3, 2005. Employer/Carrier filed a notice of controversion on April 4, 2005.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[20] Arguably, Employer was liable for Claimant's total disability compensation payment on March 17, 2005. Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by April 1, 2005, to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer did not file a timely notice of controversion on April 4, 2005, and is liable for Section 14(e) penalties from April 1, 2005 to April 4, 2005.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board

[20] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[21] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

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[21] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **July 8, 2005**, the date this matter was referred from the District Director.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from March 16, 2005 to present and continuing, based on Claimant's average weekly wage of $321.75, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's work injury occurring on or about March 3, 2005, consistent with this Decision and Order, pursuant to the provisions of Section 7 of the Act.

3. Employer/Carrier shall be liable for an assessment under Section 14(e) of the Act to the extent that the installments have been found to be due and owing prior to April 4, 2005, as provided herein.

4. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

5. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

6. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 3rd day of April, 2007, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge